Supreme Court, U.S.
FILED
DEC 6 1995
CLERK

No. 95-279

(6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM T. ATKINS,
Petitioner,

v.

DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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PETITIONER'S REPLY BRIEF

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December 6, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

26 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. RESPONDENT, DISAGREEING WITH *HARPER* AND *REICH*, HAS SIMPLY IGNORED THEM	1
II. OREGON IS PLAYING *"FAST AND LOOSE"* WITH THIS COURT	5
III. EVEN IF THE RESPONDENT'S POSITION WERE DEEMED TO HAVE MERIT, THIS CASE THEN PRESENTS THE VERY ISSUE FOR WHICH CERT. WAS GRANTED, BUT NOT REACHED, IN *REICH*	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Bass v. South Carolina, 307 S.C. 113, 414 S.E.2d 110 (1992), *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993)	4
Borg v. Department of Revenue, 308 Or. 34, 774 P.2d 1099 (1989)	3, 8
Cambridge State Bank v. James, 514 N.W.2d 565 (Minn.), *cert. denied*, 115 S. Ct. 663 (1994)	10
Dart Indus., Inc. v. Clark, 657 A.2d 1062 (R.I. 1995)	4
Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989)	1
Davis v. Wakelee, 156 U.S. 680 (1895)	9
Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993)	5
Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993)	4
Harper v. Virginia Dep't of Taxation, 462 S.E.2d 892 (Va. 1995)	4
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991)	4, 7
Lewis Ford, Inc. v. Huddleston, 1995 WL 607555 (Tenn. Ct. App. 1995)	4, 10
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990)	10
Meredith v. State Tax Comm'n, 163 Or. 305, 96 P.2d 1082 (1939)	2, 7
Nutbrown v. Munn, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 502 U.S. 1030 (1992)	*passim*
Panhandle Oil Co. v. State, 277 U.S. 218 (1928)	10
Pendell v. Department of Revenue, 315 Or. 608, 847 P.2d 846 (1993)	9
Ragsdale v. Department of Revenue, 312 Or. 529, 823 P.2d 971 (1992)	2, 7
Reich v. Collins, 114 S. Ct. 1048 (1994)	9
Reich v. Collins, 115 S. Ct. 547 (1994)	*passim*
Scarano v. Central R.R. Co., 203 F.2d 510 (3d Cir. 1953)	5
Smith, Kline & French Lab. v. State Tax Comm'n, 241 Or. 50, 403 P.2d 375 (1965)	8

TABLE OF AUTHORITIES—Continued

	Page
Waldron v. Collins, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884 (1986)	1
Waterbury v. Department of Revenue, 11 Or. Tax 314 (Or. T.C. 1989)	9
Wood v. Department of Revenue, 305 Or. 23, 749 P.2d 1169 (1988)	3, 8
Statutes	
4 U.S.C. § 111	1
Or. Rev. Stat. § 305.265(5)	1
Or. Rev. Stat. § 305.270	8
Or. Rev. Stat. § 305.419	3
Other	
19 Op. Att'y Gen. 577 (1940)	2
"Calls From Retirees Pour Into Tax Agency," *Oregonian*, April 5, 1985	6
John Paul Stevens, *Is Justice Irrelevant?*, 87 Nw. U.L. Rev. 1121 (1993)	1
"Oregon Will Study Pension Ruling," *Statesman Journal*, April 5, 1989	6
Public Salary Tax Act of 1939	2
T.B. Macaulay, letter to H.S. Randall, May 23, 1857	10
The Joint Committee on Retirement Tax Equity, April 20, 1989	1

PETITIONER'S REPLY BRIEF

I. RESPONDENT, DISAGREEING WITH *HARPER* AND *REICH*, HAS SIMPLY IGNORED THEM.

The respondent's brief in opposition is another example of Thrasymachus' approach to justice, which controlled below.[1] Indeed, this approach has controlled Oregon's decade long war of attrition to thwart federal retirees' efforts to enforce 4 U.S.C. § 111.[2]

Despite the respondent's determined efforts to obfuscate the important federal questions presented by this petition, several things nevertheless, remain clear:

—Oregon has refused to give full retroactive effect to this Court's decision in *Davis* in *this* case (and in thousands of other *Davis*-related pending claims), which irrefutably is open on direct review. *See* Or. Rev. Stat. § 305.265(5), Pet. App. E, 38a.[3]

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[1] "[E]ven false propaganda and the appropriation of private property would be just whenever the ruler is strong enough to impose his will on his subjects." John Paul Stevens, *Is Justice Irrelevant?*, 87 Nw. U.L. Rev. 1121 (1993).

[2] The respondent asserts that no federal retiree has been *"duped,"* Br. in Opp'n at 25, by its bait and switch tactics. While *"duping"* is not the constitutional standard, since at least the 1985 session of the Oregon legislature, federal retirees have continuously sought to vindicate their rights under 4 U.S.C. § 111 in full reliance on their state refund rights. *See, e.g.*, Hearings of The Joint Committee on Retirement Tax Equity, April 20, 1989. In addition, they actively supported, through the National Association of Retired Federal Employees and The Retired Officers Association, the original two designated national test cases of *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Waldron v. Collins*, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884 (1986).

[3] One of the many anomalies of the respondent's brief is its boast of its generous response to *Davis*. It is worth noting that for over three years Oregon refused to give even prospective effect to *Davis* because, in its view, the Court was wrong in *Davis*. *See, e.g., Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131, 142 (1991), *cert. denied*, 502 U.S. 1030 (1992) ("[T]he *Davis* case was wrongly decided.") And now, despite its misleading suggestions to the con-

—There is not a single case prior to Oregon's *1992 switch* that put any limiting construction on Oregon's omnibus refund statutes under Oregon's Personal Income Tax Act.

—The refund relief sought in this case is identical in all respects to that awarded to federal employees in *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939).[4]

—The respondent has held out to this Court and for over *sixty years* to taxpayers in general that the omnibus refund statutes provide a clear and certain remedy for these taxes and has now declared, only after these disputed taxes have been paid, that no such remedy exists.

—Even now, it is neither clear nor certain how a taxpayer invokes Oregon's 1992 reconfigured remedial scheme.[5]

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trary, the *only* relief that Oregon has provided is prospective—it relates *solely* to tax liabilities *first* "due and payable" after this Court's decision in *Davis*. *See Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971, 977 (1992) (ordering refunds of only those taxes due and payable on or after April 15, 1989).

[4] *Meredith* held that "Section 207 of Title II [of the Public Salary Tax of 1939] prohibited[ed]" the imposition of taxes upon the *current* compensation of federal employees under Oregon's Personal Income Tax Act. *Id.* at 312-13. These *"illegally collected [taxes] under mistake of law"* were refunded to all federal employees, with full interest for *all* years prior to 1939, who had filed refund claims under the omnibus refund statute. *See* 19 Op. Att'y Gen. 577 (1940) (emphasis added), Pet. App. F, 43a. This was so because the omnibus refund statutes "provide the express authority" to refund taxes collected *"illegally"* in violation of federal law. *Id.* It is disingenuous at best for the respondent to assert that the very same violation of the Public Salary Tax under the same state tax act is now different. The respondent's position is precisely the type of "*[n]ovelty in procedural requirements*" condemned in *Reich v. Collins*, 115 S. Ct. 547, 551 (1994).

[5] According to the respondent's latest position, a taxpayer does not file a claim for refund to obtain refunds but must instead file an action in which the statute can be declared invalid. Br. in Opp'n at 24. Yet, the only action authorized by law is a claim for refund after exhausting the omnibus refund statutes administrative

The respondent devotes an inordinate effort to justifying in hindsight the correctness of the decision announcing Oregon's reconfigured scheme. However, that effort misses the mark. The dispositive question is not the soundness of the decision but rather what the "average" "reasonable" taxpayer understood at the time the taxes were paid. *Reich v. Collins*, 115 S. Ct. 547, 550 (1994). Certainly, if it were reasonable for respondent's appellate counsel to have overlooked Oregon's reconfigured scheme in a brief filed before the United States Supreme Court in 1991, the "average" "reasonable" taxpayer could not be faulted for overlooking the same thing when the taxes were imposed. At bottom, prior to Oregon's *1992 switch*, "no reasonable taxpayer would have thought," in light of the mandatory refund claim requirements of the omnibus refund statutes, that filing an action to invalidate represented the exclusive remedy for *some* unlawful taxes. *Id.* Similarly, there is no question that for over sixty years, Oregon "did appear to hold out a 'clear and certain' postdeprivation remedy." *Id.* Thus, the "average taxpayer," *id.*, would reasonably have understood Oregon's omnibus refund statutes as the available remedy.[6]

Respondent suggests that petitioner and the forty thousand other federal retirees whose claims are still pending have no reason to complain because they had no idea before *Davis* that the taxes they were paying were unconstitutional. Oregon's argument here is no more persuasive than the very same argument rejected by the Court in *Reich*. "If the argument is that [petitioner] would not have taken advantage of the State's [action to invalidate] no matter how adequate [it was] (and thus had no stand-

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process. *See* Or. Rev. Stat. § 305.419 ("The complaint *shall* be filed as a claim for refund.") (Pet. App. E, 39a).

[6] The reasonableness of that understanding is indisputable. It was shared by the justices of the unanimous courts in *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988); *Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989); and *Nutbrown v. Munn*, *supra*. In addition, until the *switch*, it was shared by the legislature, the respondent and even respondent's appellate counsel here. *See* note 11, *infra*.

ing to complain of those remedies), the argument is beside the point: [petitioner] was entitled to pursue what appeared to be a 'clear and certain' postdeprivation remedy regardless of the State's [*action to invalidate*]." *Reich*, 115 S. Ct. at 551. Similarly, petitioner did not need to have known of the unconstitutionality, because Oregon's "refund statute had a relatively lengthy statute of limitations period, and, at least, until [Oregon's *switch*] contained no contemporaneous protest requirement [of commencing an *action to invalidate*]." *Id.*

Of course, Oregon's *switch* is not unique. It comes directly from the States' Attorneys General playbook. It is strikingly similar to the *Reich*-like *switches* attempted by several states in the wake of this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). For example, upon remand of *Bass I* for reconsideration of its prospectivity holding in light of *Beam*, the South Carolina Supreme Court in *Bass II* reconfigured South Carolina's remedial scheme. It construed South Carolina's refund statute which provided a refund remedy for "any taxpayer [for] *any* license fee or tax imposed under [the taxation title] . . ." to reach only "license-type fees and taxes." *See Bass v. South Carolina*, 307 S.C. 113, 414 S.E.2d 110, 112 (1992), *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993). In the wake of *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), South Carolina was forced to acknowledge its due process refund obligation and paid the refunds originally ordered by the trial court in *Bass I*.[7] Here, of course,

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[7] *See also Harper v. Virginia Dep't of Taxation*, 462 S.E.2d 892, 896-97 (Va. 1995) (*"Harper III"*) (rejecting Virginia's construction that its refund statutes are discretionary and not mandatory); *Dart Indus., Inc. v. Clark*, 657 A.2d 1062, 1066 (R.I. 1995) (rejecting the tax administrator's contention that the terms " 'overpayment' " and " 'erroneous payment' " in the state's general refund statute should be construed to disallow a refund for " 'illegal' " or " 'unauthorized' " taxes); *Lewis Ford, Inc. v. Huddleston*, 1995 WL 607555, *4 (Tenn. Ct. App. Oct. 17, 1995) (holding legislative reconfiguration of refund claim period from three years to one month without notice violates *Reich*).

the respondent just executed the plays in a slightly different order. It first attempted a *Reich II*, claiming that the petitioner had an adequate predeprivation remedy. This in large measure carried the day before the Oregon tax court. *See* Pet. App. 26a. However, in the wake of the Court's decision in *Reich II*, the respondent and the court below expediently reversed field to reconfigure Oregon's scheme by using the technique rejected by this Court in *Reich I* of "construing the refund statute not to apply to . . . [a] law . . . subsequently declared to be unconstitutional or otherwise invalid." *Reich*, 115 S. Ct. at 549 (citation omitted).[8]

II. OREGON IS PLAYING "*FAST AND LOOSE*"[9] WITH THIS COURT.

To thwart review in this Court, the respondent makes a number of assertions which are demonstrably untrue. First, Oregon attempts to avoid *Nutbrown* by now asserting that *Nutbrown* did not involve a claim for refunds and did not address which "precise administrative remedy would apply." *See, e.g.*, Br. in Opp'n at 20 n. 20, and 21. In *Nutbrown*, the taxpayers' complaint, including their claim for refunds, was dismissed, futility notwithstanding, for failure to allege compliance with the exhaustion of

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[8] Respondent's sole claim that it is different from Georgia is that Oregon dusted-off an irrelevant statute as the basis for denying refunds, whereas Georgia created a rule. This is yet another one of respondent's distinctions without a difference. In both this case and *Reich*, no "reasonable" taxpayer would have thought, in light of the general refund statutes available in each state, that the rules created by the courts provided the exclusive remedy for unlawful taxes. *Reich*, 115 S. Ct. at 550. And, in all events, the respondent's assertion misses the mark. Sixty years of Oregon precedent establishes that Oregon's reconfigured scheme was cut from the same whole cloth that was used by Georgia in *Reich*.

[9] *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953). "Judicial estoppel looks to the connection between the litigant and the judicial system." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993). "It preserves the integrity of the courts by preventing litigants from 'playing fast and loose with the courts.'" *Id.* (citation omitted).

administrative remedies provided under the omnibus refund provisions. The available, adequate, and mandatory administrative remedies identified by the respondent in *Nutbrown*, indeed the *only* administrative remedies provided by Oregon law under the Personal Income Tax Act for refund claims, were Oregon's omnibus refund provisions. *See, e.g.*, Pet. App. G at 47a; App. H at 48a-49a.[10] The Oregon Supreme Court definitively held that under Oregon's omnibus refund provisions:

> [T]he Department *can* (and may) give Taxpayers all the relief Taxpayers claim they are entitled to under an appropriate, constitutional reading of the Oregon tax system.

Nutbrown, 811 P.2d at 141 (emphasis in the original).[11]

Respondent's proffered explanation for why it should not be held to its positions before this Court and the holding of the Oregon Supreme Court in *Nutbrown* is untenable. *See, e.g.*, Br. in Opp'n. at 21 n.16. Whatever problems there may have been in communication among members of the Attorney General's Office, such problems, if any, did not result in an inadvertent oversight by the respondent's appellate counsel. Respondent's appellate

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[10] *See also* Respondent's Brief in Opposition in *Nutbrown v. Munn*, U.S. No. 91-457 (December 5, 1991) at 12 ("Petitioners do not suggest that DOR lacks the authority to grant them the refunds they seek. . . .").

[11] Equally disingenuous is the respondent's suggestion that neither it nor the legislature was aware of the clear and certain Oregon three year refund remedy available to federal retirees in the wake of *Davis*. The respondent advised all federal retirees "who paid taxes on a governmental pension in 1985 [to] file a 'protective claim' or an amended tax form by April 17, when the three-year limit on changing 1985 tax claims ends." *See* "Calls From Retirees Pour Into Tax Agency," *Oregonian*, April 5, 1985 at D8. Similarly, on April 5, 1989, House Speaker Vera Katz stated that Oregon's revenue loss for the two year budget period commencing July 1, 1989 "would rise to $170 Million [$100 million of which represented Oregon's liability for refunds] if any refunds are made retroactive for three years, the maximum time span allowable by tax law." *See* "Oregon Will Study Pension Ruling," *Statesman Journal*, Salem, Ore., April 5, 1989, at 3C. *See also* note 2, *supra*.

counsel was fully aware of Oregon's change in position to "reconfigure its scheme, unfairly, in *midcourse*. . . ." *Reich*, 115 S. Ct. at 550. As estabilshed by the appearances of record in *Nutbrown* and *Ragsdale*, the respondent was represented by the *same* appellate counsel in each case.[12] Therefore, when the respondent's appellate counsel asserted to this Court in its *December 5, 1991* brief in *Nutbrown* that this Court should deny the petition because Oregon's omnibus refund provisions provided an *adequate* remedy, appellate counsel knew that the respondent had already implemented the "switch" in *Ragsdale*. Respondent's appellate counsel orally argued the "switch" in *Ragsdale* on *July 10, 1991*. *See Ragsdale*, 823 P.2d at 971. Nothing was overlooked as the respondent now claims. The reason for the respondent's *switch* in *Ragsdale* and here is self-evident. In the wake of this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the remedy game had changed. The respondent recognized that it would no longer be able to avoid its refund obligation by claiming that *Davis* should be given prospective effect so it executed the plays from the States' new remedy playbook.

Finally, through euphemism,[13] respondent purports to

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[12] *See Nutbrown*, 811 P.2d at 132; *Ragsdale*, 823 P.2d at 972. *See also* Respondent's Brief in Opposition, *Nutbrown v. Munn*, U.S. No. 91-457 at 16. In addition, respondent's *general counsel* appeared at oral argument in *Nutbrown*.

[13] Respondent now refers to all earlier cases in which refunds were made to taxpayers based upon the unconstitutional imposition of taxes under the omnibus refund statutes as not involving a tax law's "invalidity," but cases in which Oregon merely "erroneously applied a statute to deny the taxpayer an exemption." (Br. in Opp'n at 18). This Machiavellian distinction without a difference by no means can be justified under the "average, reasonable taxpayer" test announced in *Reich*. Under the respondent's view, declaring a tax invalid under the feedral constitution is supposedly different from declaring that the federal constitution: does not permit the imposition of tax, requires that income be exempt from tax or, as in this case, requires a declaration of equal treatment. This case is the identical twin of *Meredith v. State Tax Comm'n*, 163 Or. 305, 96 P.2d 1082 (1939). Yet, respondent seemingly asserts

explain away an unbroken line of Oregon precedent spanning over six decades establishing the right of taxpayers to obtain refunds under the omnibus refund statute for all taxes subsequently declared invalid or unconstitutional. Respondent's position is untenable.

In *Borg v. Department of Revenue*, 308 Or. 34, 774 P.2d 1099 (1989), the Oregon Supreme Court expressly applied the "nondiscrimination rule of *Davis v. Michigan Dep't of Treasury*" in invalidating Oregon's discriminatory scheme of taxing federal obligations and affirming the tax court's judgment ordering refunds with full statutory interest under Or. Rev. Stat. § 305.270. *Id.* at 1101-02.[14] The respondent now claims that is not so. However, the judgment of the tax court affirmed in *Borg* establishes that full refunds with interest under the omni-

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that the unlawful imposition of taxes upon *current* federal compensation is entitled to full refund relief because the State erroneously failed to exempt income while the same tax on *deferred* federal compensation sixty years later is entitled to no relief because it was necessary to invalidate the state's failure to exempt the same compensation.

[14] Similarly, in *Smith, Kline & French Lab. v. State Tax Comm'n*, 241 Or. 50, 403 P.2d 375 (1965), refund relief for Oregon's unconstitutional taxes was only available under the omnibus refund statute. The facts reflect that Smith Kline paid Oregon income taxes for years 1955 through 1958 in *May of 1958*. *Id.* at 403 P.2d at 376. The facts further reflect that Smith Kline did not seek administrative relief until *September 1960*. *Id.* The Oregon Supreme Court specifically reversed the tax court's denial of refunds and held that the state statute under which the taxes were imposed must yield under the Commerce Clause. *Id.* at 380. The holding of the Oregon Supreme Court in *Smith Kline* would *not* have been possible under Oregon's reconfigured scheme because Smith Kline did not take any step, let alone commence an action, until *1960*, well after the year in which the taxes were paid. Just as unpersuasive is the respondent's discussion of *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988). In *Wood*, the court specifically held that "ORS 316.127(1)(a) violates plaintiffs' claimed federal constitutional rights" and reversed the tax court's denial of refunds for 1979, 1980 and 1981. *Id.* at 25.

bus refund statute were ordered, calculated and paid by the respondent.[15]

The positions advanced by the respondent directly implicate the integrity of the certiorari process. Having successfully evaded review for its constitutional violations in *Nutbrown*, the respondent should not be permitted to escape review here by its facile repudiation of the existence of the very remedy upon which it urged no review was necessary in *Nutbrown*. As the Court held over a hundred years ago, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Accordingly, this Court should grant the petition and order the respondent to provide the *adequate* three-year refund remedy which Oregon asserted was available and which the Oregon Supreme Court held was available to federal retirees in *Nutbrown*.

III. EVEN IF THE RESPONDENT'S POSITION WERE DEEMED TO HAVE MERIT, THIS CASE THEN PRESENTS THE VERY ISSUE FOR WHICH CERT. WAS GRANTED, BUT NOT REACHED, IN *REICH*.

In *Reich*, the court granted certiorari limited to Question 1. *Reich*, 114 S. Ct. 1048 (1994). On the merits in *Reich*, it was unnecessary for the Court to resolve the question presented of whether the state had provided a clear and certain remedy. Here, the respondent asserts that a taxpayer may be forced to act at his "*peril*" in an exclusively post-deprivation state remedial scheme with-

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[15] If respondent's current assertion were true, no interest would have been adjudged in *Borg* or *Waterbury*. Under Oregon's newly reconfigured scheme, no interest is paid. *See Pendell v. Department of Revenue*, 315 Or. 608, 847 P.2d 846 (1993). The relevant excerpts from the tax court's judgment in *Borg* and the companion case *Waterbury v. Department of Revenue*, 11 Or. Tax 314 (Or. T.C. 1989), reflecting refunds calculated under the omnibus refund statute, appear in the Appendices to this brief at 2a and 8a.

out offending the Constitution's mandate that states must provide a clear and certain remedy. The position advanced by the respondent is in irreconcilable conflict with the decisions of this Court. *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 39 (1990) ("[T]he State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy. . . .' ") (footnote and citation omitted). It is also in conflict with the decisions of state courts of last resort. *See, e.g., Cambridge State Bank v. James,* 514 N.W.2d 565, 570 (Minn.). *cert. denied,* 115 S. Ct. 663 (1994) (because the avenue for challenging the tax was discernible only with hindsight, "this mechanism [did not] provide[] the 'meaningful opportunity' called for by McKesson."); *Lewis Ford, Inc. v. Huddleston,* 1995 WL 607555, *3 (Tenn. Ct. App. 1995) ("[I]t cannot be said that a taxpayer must be clairvoyant. . . ."). Thus, this Court should grant the petition to resolve the important and recurring federal question of the appropriate contours of a state remedy that is adequate to satisfy the due process requirement of "a clear and certain remedy."

CONCLUSION

It is ironic that respondent invokes Lord Macaulay to support its assault on the petitioner's constitutional rights. While it may appear to respondent and Lord Macaulay that "[*our*] *Constitution* is all sail and no anchor," T.B. Macaulay, letter to H.S. Randall, May 23, 1857 (emphasis added), certainly that cannot be so "while this Court sits." *Panhandle Oil Co. v. State,* 277 U.S. 218, 223 (1928) (Holmes, J. dissenting). Respondent and apparently the court below have forgotten the fundamental principle that the Constitution is the Supreme Law of the Land. Thus, this petition must be granted and the decision below reversed in order to affirm that, even in Oregon, the Constitution is the Supreme Law of the Land.

Respectfully submitted,

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December 6, 1995